

JAMES EDWARD SIMMONS §  
v. § CIVIL ACTION NO. 6:09cv412  
DIRECTOR, TDCJ-CID §

The Petitioner James Simmons, proceeding *pro se*, filed this application for the writ of habeas corpus complaining of the legality of his conviction. This Court ordered that the case be referred to the United States Magistrate Judge pursuant to 28 U.S.C. §636(b)(1) and (3) and the Amended Order for the Adoption of Local Rules for the Assignment of Duties to United States Magistrate Judges.

Simmons was convicted of delivery of a controlled substance on October 16, 1995, receiving a sentence of 50 years in prison. He unsuccessfully appealed his conviction and sought state habeas corpus relief, and has also sought federal habeas corpus relief concerning this same conviction. *See Simmons v. Director, TDCJ-CID*, civil action no. 6:02cv267 (E.D.Tex., dismissed with prejudice July 31, 2002, certificate of appealability denied by Fifth Circuit February 20, 2003).

Simmons contends that he is actually innocent, the prosecutor used perjured testimony, there was no evidence to support the conviction, and the testimony of the witness against him was uncorroborated.

After review of the pleadings, the Magistrate Judge issued a Report recommending that the petition be dismissed without prejudice until such time as Simmons could show that he had received permission from the Fifth Circuit Court of Appeals to file a successive petition, as required by 28 U.S.C. §2244(b)(3). Simmons received a copy of this Report on September 28, 2009, but no

objections have been filed; accordingly, he is barred from *de novo* review by the district judge of those findings, conclusions, and recommendations and, except upon grounds of plain error, from appellate review of the unobjected-to proposed factual findings and legal conclusions accepted and adopted by the district court. Douglass v. United Services Automobile Association, 79 F.3d 1415, 1430 (5th Cir. 1996) (*en banc*).

The Court has reviewed the pleadings and records in this cause and the Report of the Magistrate Judge. Upon such review, the Court has concluded that the Report of the Magistrate Judge is correct. It is accordingly

ORDERED that the Report of the Magistrate Judge is ADOPTED as the opinion of the District Court. It is further

ORDERED that the above-styled application for the writ of habeas corpus be and hereby is DISMISSED without prejudice, with refiling conditioned upon receipt of permission from the Fifth Circuit to file a successive petition. Simmons may not refile this petition without first obtaining such permission. The dismissal of the present petition shall not prevent Simmons from seeking permission from the Fifth Circuit to file a successive petition. It is further

ORDERED that the Petitioner James Simmons is hereby DENIED a certificate of appealability *sua sponte*. This denial refers only a certificate of appealability in the present case and shall have no effect upon Simmons' right to seek permission from the Fifth Circuit to file a successive petition, nor upon his right to pursue such a petition once that permission has been obtained. Finally, it is

ORDERED that any and all motions which may be pending in this civil action are hereby DENIED.

**So ORDERED and SIGNED this 3rd day of November, 2009.**

A handwritten signature in black ink, appearing to read 'Leonard Davis', written over a horizontal line.

**LEONARD DAVIS  
UNITED STATES DISTRICT JUDGE**